

1

2

3

4

5

6

7

(

5

;

9

10

4

5

6

20

91

92

23

94

25

26

1

1 School for the Deaf, PAB No. D89-004 (1989); Countryman v. Dep't of Social and Health Services,
2 PAB No. D94-025 (1995); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053
3 (1994); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992); Aquino v. University of
4 Washington, PAB No. D93-163 (1995).

6 **II. MOTION**

7 2.1 On September 22, 1999, Appellant filed a Motion to Strike and Exclude Hearsay and
8 Polygraph Results. In addition, Appellant's motion included a request to strike an Employee
9 Conduct Report (ECR) that was issued against Appellant by Associate Superintendent Gary
10 Fleming while Appellant was the subject of an investigation being conducted by the Pierce County
11 Sheriff's Office.

12
13 2.2 On September 29, 1999, Respondent filed a response in opposition to Appellant's motion.
14 On September 30, 1999, at the outset of the hearing on the merits of the appeal, the Board heard
15 argument on Appellant's motion.

16
17 2.3 Appellant first argued that the Board should exclude any hearsay evidence from persons
18 who were not available to testify at the hearing. Appellant asserted that there was no way to test the
19 credibility of persons who were not available to testify.

20
21 Appellant argued that the results of polygraph examinations are not admissible (without
22 agreement of the parties) in any criminal or civil action in the courts because polygraph
23 examinations have not been proved to be scientifically reliable. Appellant further argued that the
24 key purpose of the Board is to determine credibility and weigh evidence and that polygraph

1 examinations usurp the responsibility of the Board to decide the credibility of the witness who was
2 subject to the examination.

3
4 Secondly, Appellant argued that he had been given an ECR and was administratively
5 assigned to home. While he was at home, he was under investigation by the Pierce County
6 Sheriff's Office. The Associate Superintendent called him at home and directed him to write an
7 incident report for a separate matter. Appellant did not provide the incident report requested and he
8 was given a second ECR. Appellant contended he was acting within his Fifth Amendment Rights
9 and those guaranteed to him under Article I, Section 9 of the State Constitution when he did not
10 provide the incident report. Furthermore, Appellant contended that Respondent has no statutory
11 authority to order him to waive his constitutional rights. Therefore, Appellant argued that the
12 second ECR should be struck from the disciplinary letter and any evidence related to the second
13 ECR should be excluded from the hearing.

14
15 2.4 Respondent argued that the hearsay rules of evidence do not apply to matters before the
16 Board and that the Board's practice has been to allow the disciplinary letter and attachments into
17 the record and to give the documents the appropriate weight. Respondent asserted that there was no
18 reason for the Board to vary from this long standing practice.

19
20 Respondent argued that in the past, the Board has allowed the admission of polygraph
21 examinations for limited purposes. Respondent stated that in this case, Appellant had submitted to
22 the polygraph knowingly, willingly and on the advice of legal counsel during the course of his
23 criminal proceedings over the same matter that is the subject of this appeal. Respondent contended
24 that its intent to offer the results of Appellant's polygraph examination was consistent with the
25 Board's practice.

1 With respect to the second ECR, Respondent argued that Appellant's motion was contrary to
2 law. Respondent asserted that Appellant was not forced to respond to the allegations that were the
3 subject of the investigation being conducted by the Pierce County Sheriff's Office, but rather, he
4 was asked what he recalled with respect to an altercation between two inmates which was a separate
5 matter.

6
7 2.5 The Board heard the arguments of the parties and issued an oral ruling. The Board denied
8 Appellant's motion to strike and exclude hearsay and stated that it would determine the appropriate
9 weight to give to any hearsay evidence offered and admitted during the hearing. The Board granted
10 Appellant's motion to strike and exclude the polygraph results on the sole basis that the polygraph
11 examination was done after Appellant's dismissal from employment and was not part of the
12 information considered by the appointing authority in making her determination that dismissal was
13 the appropriate sanction. The Board denied Appellant's request to strike and exclude the second
14 ECR because Appellant had an opportunity to respond to the second ECR and because the second
15 ECR was part of the information considered by the appointing authority.

16 17 **III. FINDINGS OF FACT**

18 3.1 Appellant Dondia Lenoir was a Correctional Officer and a permanent employee of
19 Respondent Department of Corrections (DOC) at the Washington Corrections Center for Women
20 (WCCW). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules
21 promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the
22 Personnel Appeals Board on August 5, 1996.

23 3.2 By letter dated June 28, 1996, Respondent notified Appellant of his suspension without pay
24 from June 29, 1996 through July 13, 1996, followed by his immediate dismissal from his position
25 effective July 14, 1996. Respondent charged Appellant with neglect of duty, insubordination, gross
26

1 misconduct and willful violation of published employing agency or department of personnel rules
2 or regulations. Respondent alleged that Appellant kissed Inmate Patricia; on two occasions,
3 engaged in nonconsensual sexual intercourse with Inmate Patricia; and failed to write an incident
4 report as directed by Associate Superintendent Gary Fleming.

5
6 3.3 During the two days of hearing on this appeal, the parties presented the Board with
7 conflicting testimony about each of the allegations. Having carefully weighed the credibility of the
8 witnesses and documentary evidence, we find former Inmate Patricia to be credible. As a result,
9 based on the credible testimony of Patricia and others, and on a preponderance of the credible
10 evidence, we make the following findings.

11
12 3.4 Appellant became acquainted with Patricia while she was incarcerated at WCCW. During
13 her time at WCCW, Patricia worked in the "O" building performing data entry duties. In addition,
14 Patricia worked as a photographer and had access to other areas of the institution when performing
15 her photography duties. Patricia was also a tier representative for her living unit in the Minimum
16 Security Compound (MSC).

17
18 3.5 The "O" building was located in the MSC. The "O" building was in Appellant's zone of
19 control and he was responsible for checking on the security of the area. While Patricia was
20 performing her data entry duties, Appellant spent an inordinate amount of time in the "O" building.

21
22 3.6 About the second Thursday in December 1995, a tier representative meeting was to be held
23 in the library of the "M" building. Patricia was waiting at "M" building for an officer to unlock the
24 door. Appellant arrived, unlocked the door, and walked into the building behind Patricia. Patricia
25 walked into the library and Appellant kissed her. Patricia did not immediately report Appellant's

1 conduct because was she was afraid, felt intimidated and did not believe that she was in a position
2 to be vocal about the situation.

3
4 3.7 After dinner on December 18, 1995, Appellant saw Patricia as she was walking outside of
5 her living unit. Patricia was going to the Special Needs Unit to follow-up on her photography
6 duties. He told her to go with him. As they were walking, the librarian from "O" building saw
7 them and informed Patricia that the books Patricia had ordered were in. Appellant and Patricia
8 continued to walk. Appellant took Patricia to the "O" building and they entered the classroom. In
9 the classroom, Appellant pushed Patricia against a chair, pulled down her sweatpants, told her "she
10 needed to be easy," and proceeded to engage in nonconsensual sexual intercourse with her. Patricia
11 did not see Appellant unzip his pants, but she saw his penis protruding through his pants.

12
13 3.8 Although Patricia worked in the "O" building, she did not have access to the classroom.
14 After Appellant had finished having intercourse with Patricia, he adjusted his clothing and left the
15 room. Patricia wrote the date and time on a file label and affixed the label to the side of the desk
16 drawer as proof that they had been there. The incident lasted approximately 5 to 10 minutes.

17
18 3.9 Appellant returned to the room and told Patricia that movement would be in a few minutes.
19 Patricia waited until movement started, then left the building and returned to her living unit. When
20 Patricia returned to her unit, she showered, but she did not tell anyone what had happened.

21
22 3.10 Appellant's shift log for December 18, 1995 shows that at 6:15 p.m. he had finished
23 releasing the kitchen workers to return to their units. The next entry shows that Appellant checked
24 the Pioneer Industries inmate crew into the institution at 6:47 p.m. Appellant's final log entry was
25 made at 8:55 p.m. and indicated that he had completed his security check of the MSC.

1
2 3.11 After the December 18th encounter, Patricia saw Appellant everyday when she was working
3 in the "O" building. On January 5, 1996, Appellant told Patricia to meet him at the "O" building.
4 Patricia felt intimidated so she complied. When she arrived at "O" building, she entered and sat in
5 a chair outside of the classroom. The door to the classroom was open. Patricia told Appellant that
6 she wanted to go back to her unit, but Appellant told her that movement was over and told her to go
7 to the classroom. Patricia complied. When they were in the classroom, Appellant unbuttoned
8 Patricia's shirt, then unbuttoned and dropped her pants. He then unfastened his pants and
9 proceeded to engage in nonconsensual sexual intercourse with Patricia. After Appellant had
10 finished intercourse with Patricia, he adjusted his clothing and left the room. Patricia put her cloths
11 back on. Appellant returned to the room, they engaged in a conversation and then they left the
12 room. Patricia waited in the foyer until movement began and then she returned to her living unit
13 and took a shower. Patricia did not immediately report this incident.

14
15 3.12 On January 17, 1996, Patricia and Inmate Rhodes were involved in a physical altercation
16 outside of the "M" building. Appellant witnessed the altercation, but he did not report it.

17
18 3.13 On January 26, 1996, Patricia told her attorney, Jeanette Booth, about the incidents of
19 nonconsensual sexual intercourse with Appellant. In addition, Patricia wrote a statement about the
20 incident. Ms. Booth reported the alleged sexual assaults and on February 2, 1996, Associate
21 Superintendent Gary Fleming initiated an ECR against Appellant. In addition, the alleged sexual
22 assaults were reported to the Pierce County Sheriff's Office. Appellant was administratively
23 assigned to home while the allegations were investigated.

1 3.14 On February 9, 1996, while Appellant was on home assignment, Mr. Fleming directed staff
2 to confiscate Appellant's uniform pants from Appellant's home. Appellant's pants each had a hole
3 in the crotch area. The holes were approximately ¾ inches, 1 ¼ inches and 1 ½ inches.

4
5 3.15 On the afternoon of February 9th, shortly after Appellant's pants had been confiscated, Mr.
6 Fleming contacted Appellant at home by telephone to ask him what he had observed occurring
7 between Patricia and Inmate Rhodes on January 17, 1996. During the conversation, Appellant
8 received a phone call on a second telephone. Appellant interrupted the conversation with Mr.
9 Fleming to answer a second telephone. When he returned to the telephone with Mr. Fleming,
10 Appellant was hesitant to continue the conversation. Mr. Fleming then directed Appellant to write
11 an incident report describing what he had observed occurring between Patricia and Inmate Rhodes
12 on January 17th. Appellant did not write an incident report, but he did provide a written statement
13 dated February 9, 1996 in which he reported that he did not recall any incidents occurring on
14 January 17th.

15
16 3.16 On February 12, 1996, Mr. Fleming initiated an ECR against Appellant alleging that
17 Appellant did not complete an incident report of the January 17, 1996 incident as directed. The
18 ECR was investigated by Correctional Captain Douglas Cole. Captain Cole concluded that
19 Appellant's statement failed to reflect the information Appellant shared with Mr. Fleming during
20 their February 9, 1996 telephone conversation.

21
22 3.17 Appellant testified that he had no previous corrective actions while at WCCW. However,
23 his employment record at WCCW shows that he had a history of corrective actions and counseling.
24 On August 8, 1989, he received a letter of reprimand for engaging in a personnel conversation with
25 an inmate while using a state phone. On November 20, 1990, he received a letter of reprimand for

engaging in inappropriate interactions with inmates and for failing to correct inmate behavior. On December 5, 1990, he received a letter of reprimand for engaging in inappropriate interactions with inmates, for conducting incorrect inmate inventories, for allowing inmates to receive unauthorized items from home and for leaving the control booth. On November 10, 1993, he received a letter of reprimand for leaving a gate unsecured and failing to complete a security check and documentation. On November 21, 1994, he received a letter of reprimand for leaving a door unlocked and failing to complete a security check and documentation. On January 10, 1995, he received a letter of reprimand for an unauthorized absence. On January 10, 1995, he received a letter of counseling for eating institution food on shift without a meal ticket and for being overly familiar with inmates by eating with them.

3.18 In addition, Appellant admitted a weakness for women to a co-worker. Larry Young is a Cook-AC at WCCW. He began working with Appellant in the MSC kitchen toward the end 1992. During a conversation with Appellant in 1993 or 1994, Appellant told Mr. Young that he was a born-again Christian and that his weakness was women. Mr. Young comment to Appellant that he was in the wrong place and Appellant responded that maybe his weakness wasn't the women at WCCW. Based on the credible testimony of Mr. Young and on Appellant's history of misconduct involving female inmates, we find that Appellant had a propensity for engaging inappropriate behavior with female inmates.

3.19 WCCW policies and expectations address staff relationship with inmates. Staff are required to subscribe to high moral and ethical standards and to treat inmates professionally. Staff are prohibited from showing favoritism to offenders and are prohibited from engaging in personal communications or relationships with offenders. Appellant was aware of these policies and expectations. In addition, Appellant was aware of WCCW's field instruction 400.301 which

1 requires staff to prepare an incident report if they observe or are informed of any alleged incidents
2 or misconduct.

3
4 3.20 Alice Payne, Superintendent of WCCW, took the allegations made by Patricia seriously.
5 When serious allegations are made by an inmate, Ms. Payne meets with the inmate to test the
6 inmate's credibility. Ms. Payne met with Patricia and after conducting a fact finding investigation,
7 she determined that Patricia was credible and directed Mr. Fleming to initiate an ECR against
8 Appellant. After the completion of the ECR process, Ms. Payne concluded that the incidents of
9 nonconsensual sexual intercourse had occurred. Furthermore, following a review of the second
10 ECR, Ms. Payne concluded that Appellant withheld information and failed to complete an incident
11 report of the January 17th altercation between Patricia and Inmate Rhodes.

12
13 3.21 Prior to determining the level of discipline to impose, Ms. Payne reviewed Appellant's prior
14 reprimands and corrective actions and reviewed both the ECRs and all of the investigative reports.
15 Ms. Payne determined that Patricia was believable and that her behavior was typical of a sexual
16 assault victim. As a result, Ms. Payne concluded that Appellant had neglected his duty, willfully
17 violated agency policies, was insubordinate, and that his behavior rose to the level of gross
18 misconduct. Ms. Payne felt that in this instance, Appellant's behavior was morally and ethically
19 unconscionable and could not be condoned or tolerated. Ms. Payne also felt that Appellant had lost
20 the trust of his peers and superiors and that his history of problems with staff boundaries had not
21 improved. In conclusion, Ms. Payne decided that termination was warranted.

22 23 **IV. ARGUMENTS OF THE PARTIES**

24 4.1 Respondent argues that the testimony of Patricia was credible. Respondent argues that
25 Patricia's testimony had a theme of commonality and that while her various interviews contained

1 some minor discrepancies, they were inconsequential to the types of allegations she made.
2 Respondent contends that if Patricia was not sexually assaulted, she would not have come forward
3 and subjected herself to testify in court and before the Board. Respondent contends that Patricia is
4 no longer an inmate, she can't be infracted, and that there was no reason for her to be untruthful
5 about what occurred. Respondent asserts that agency policy prohibits sexual contact between staff
6 and inmates no matter whether the contact is consensual or not. Respondent further asserts that
7 Appellant has not been credible. For example, Respondent asserts that contrary to Appellant's
8 testimony, Appellant's shift log shows that he had time to sexually assault Patricia and that contrary
9 to his assertion that he had not received any letters of reprimand, the record proves that he had a
10 history of receiving reprimands and counseling. Respondent argues that the credible facts support
11 the sanction of dismissal and that the appeal should be denied.

12
13 4.2 Appellant asserts that Patricia has been inconsistent in her retelling of the alleged sexual
14 assaults, that she has presented contradictory statements and that she is not credible. Appellant
15 asserts that the sexual assaults did not occur. Appellant contends that he accounted for his time and
16 that he did not have time to commit the acts alleged by Patricia. Furthermore, Appellant contends
17 that it was impossible for him to sexually assault Patricia through the holes in the crotch of his
18 pants. Appellant also contends that the investigation process was not complete, that people who
19 should have been interviewed were not, that it is suspicious that Patricia did not confide in Ms.
20 Booth immediately, and that the personal information Appellant allegedly confided to Patricia was
21 not true. In regard to Appellant's interactions with Mr. Fleming over the phone, Appellant argues
22 that he was on home assignment and had reason to suspect that Mr. Fleming was setting him up.
23 But regardless, Appellant asserts that he did provide a statement. Appellant further asserts that the
24 prior letters of reprimand are not relevant to issue before the Board. Because Patricia was not

1 credible, Appellant asserts that Respondent failed to prove his alleged misconduct and his appeal
2 should be granted.

3 4 **V. CONCLUSIONS OF LAW**

5 5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
6 herein.

7
8 5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
9 the charges upon which the action was initiated by proving by a preponderance of the credible
10 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
11 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
12 Corrections, PAB No. D82-084 (1983).

13
14 5.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
15 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
16 of Social & Health Services, PAB No. D86-119 (1987).

17
18 5.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
19 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

20
21 5.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior
22 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.
23 Dep't of Social and Health Services, PAB No. D94-025 (1995).

1 5.6 Willful violation of published employing agency or institution or Personnel Resources
2 Board rules or regulations is established by facts showing the existence and publication of the rules
3 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
4 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
5 Health Services, PAB No. D93-053 (1994).

6
7 5.7 Based on a preponderance of the credible evidence, Respondent has met its burden of
8 proving that Appellant kissed Patricia and engaged in nonconsensual sexual intercourse with her on
9 two occasions. Appellant's conduct was clearly a neglect of duty, was contrary to the expectations
10 set forth by his previous corrective actions, violated WCCW policies and expectations and rose to
11 the level of gross misconduct.

12
13 5.8 Respondent has failed to prove that Appellant did not provide an incident report as directed
14 by Mr. Fleming. In response to his conversation with Mr. Fleming, Appellant provided a written
15 statement. Under the facts presented here, Appellant's written statement was a sufficient response
16 to Mr. Fleming's directive to Appellant to provide an incident report.

17
18 5.9 In determining whether a sanction imposed is appropriate, consideration must be given to
19 the facts and circumstances including the seriousness and circumstances of the offense. The penalty
20 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent
21 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.
22 An action does not necessarily fail if one charge is not sustained unless the entire action depends on
23 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

1 5.10 Even though Respondent failed to prove that Appellant violated Mr. Fleming's directive,
2 Appellant's misconduct with Patricia was so egregious that it warrants the most severe disciplinary
3 sanction available. Therefore, Appellant's dismissal should be affirmed and his appeal should be
4 denied.

5
6 5.11 Although it is not appropriate to initiate discipline based on prior formal and informal
7 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
8 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.
9 D93-163 (1995).

10
11 5.12 Appellant's history of corrective actions shows a pattern of over-familiarity with inmates.
12 This pattern and the nature of Appellant's previous misconduct further support the sanction of
13 dismissal.

14
15 **VI. ORDER**

16 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Dondia Lenoir is denied.

17 DATED this _____ day of _____ 1999.

18 WASHINGTON STATE PERSONNEL APPEALS BOARD

19
20 _____
21 Walter T. Hubbard, Chair

22 _____
23 Gerald L. Morgen, Vice Chair

24 _____
25 Nathan S. Ford Jr., Member

26
Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504